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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 448

UNION CARTAGE COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal from the United States District Court for the District of Massachusetts

JURISDICTIONAL STATEMENT

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September 27, 1961

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On Appeal from the United States District Court for the District of Massachusetts

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JURISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of the Revised Rul of the Supreme Court of the United States, appella takes appeal from a final order and judgment of th United States District Court for the District of Ma sachusetts, entered on April 26, 1961, sustaining report and order of the Interstate Commerce Com mission, and submits this Statement to show that th Supreme Court of the United States has jurisdictio of this appeal and that a substantial question presented.

OPINION BELOW

The opinion of the District Court for the District of Massachusetts is reported in 193 F. Supp. 645. The opinion of the Interstate Commerce Commission is reported in 309 I.C.C. 333. Copies of the opinion and judgment of the District Court, and of the opinion of the Interstate Commerce Commission, are attached hereto as Appendix A and Appendix B, respectively.

JURISDICTION

This suit was brought under 28 U.S.C. Section 1336 and 28 U.S.C. Section 2325, to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered on April 26, 1961, and notice of appeal was filed in that Court June 5, 1961. Jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code Section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Alton R. Co. v. *United States,* 287 U.S. 229 (1932)
Baltimore & O. R. Co. v. *United States,* 298 U.S. 349 (1936)
Andrew G. Nelson v. *United States,* 355 U.S. 554 (1957)

QUESTION PRESENTED

Where the Interstate Commerce Commission has interpreted the phrase "and commodities requiring the use of special equipment" as not including transportation of petroleum and petroleum products, in bulk, in apparent disregard of its interpretation of the phrase in question at the time the authority was granted, and upon which appellant has relied in pur-

chasing a certificate of public convenience and necessity which includes such phrase, has the Commission, by its action, rendered the phrase in question meaningless, so as to deprive appellant of its property in contravention of the Fifth Amendment.

STATEMENT OF THE CASE

Appellant, Union Cartage Company, is a Massachusetts corporation engaged in business as a common carrier by motor vehicle of various commodities, including petroleum products, in bulk, as authorized in its certificate of public convenience and necessity issued by the Interstate Commerce Commission in Docket No. MC-95490.

On August 18, 1958, appellent issued and filed with the Interstate Commerce Commission, in accordance with Section 217 of the Interstate Commerce Act (49 U.S.C. 317), a tariff designated as MF-I.C.C. No. 15 setting forth commodity and specific mileage rates for the transportation of commodities in tank trucks in interstate commerce applying between points in Massachusetts, New Hampshire, Rhode Island, and Vermont. The tariff was scheduled to become effective on September 19, 1958.

The certificate on which this tariff was based was purchased from Sherman Brown Manning, d/b/a S. B. Manning. This purchase of operating authority was approved by the Interstate Commerce Commission in Docket No. MC-FC-60852. The operating authority involved in this purchase was as follows:

> IRREGULAR ROUTES:
>
> *Contractor's machinery and equipment, heavy machinery, and commodities requiring the use of special equipment,*

Between points in Essex, Caledonia, Orange, Windsor, and Windham Counties, Vermont, and those in New Hampshire, and that part of Massachusetts east of Massachusetts Highway 12 and north of Massachusetts Highway 44, including points on the indicated portions of the highways specified.

Agricultural machinery,

Between White River Junction, Vermont, and points in Vermont and New Hampshire within 35 miles of White River Junction.

Sand and Gravel,

From Lebanon, New Hampshire, to points in Vermont within 30 miles of Lebanon, with no transportation for compensation on return except as otherwise authorized.

Fertilizer,

From White River Junction, Vermont, to points in New Hampshire within 35 miles of White River Junction, with no transportation for compensation on return except as otherwise authorized.

A petition requesting suspension and investigation of this tariff was filed with the Interstate Commerce Commission on behalf of P. B. Mutrie Motor Transportation, Inc. Union Cartage Company filed a reply to the petition.

By order entered September 16, 1958, the Interstate Commerce Commission, Board of Suspension, instituted an investigation concerning the lawfulness of the rates, charges and regulations contained in said tariff with particular reference as to whether the publication of said rates would be beyond the scope of appellant's

operating authority. An order of the Commission dated September 16, 1958, suspended the operation of the tariff and deferred the use thereof for shipments in interstate or foreign commerce to and including April 18, 1959, unless otherwise ordered by the Commission.

The matter was first set for oral hearing on June 22, 1959, at Boston, Massachusetts, but was later postponed until September 15, 1959. The hearing was held at the latter date before Hearing Examiner William J. Kane. Union Cartage Company adduced evidence through an officer and through an expert witness of the English language. Intervenor, P. B. Mutrie Motor Transportation, Inc., presented testimony through its traffic manager and also through the testimony of its counsel.

It was developed at the hearing that prior to the purchase of this certificate from S. B. Manning, Mr. Anthony Russell, Vice President of Union Cartage Company, the appellant, discussed the scope of the certificate with the District Supervisor of the Interstate Commerce Commission, located at Lebanon, New Hampshire. The Supervisor informed Mr. Russell that the commodity authorization of "commodities requiring the use of special equipment" would embrace tank truck operations. Thereafter, Mr. Russell discussed the involved certificate with a registered practitioner before the Interstate Commerce Commission, and in turn, with an attorney from the Interstate Commerce Commission, at Boston, Massachusetts, who advised that the certificate authorized tank truck operations.

In addition, Mr. Russell was advised by his attorney that the commodity authorization of "commodities requiring the use of special equipment" included the right to transport commodities in bulk, in tank vehicles.

Upon completion of these preliminary steps to determine the scope of the certificate, appellant entered into a written agreement with the holder, Sherman B. Manning, to purchase the involved certificate of public convenience and necessity.

Briefs were filed both by plaintiff and intervening defendant, and thereafter, by report and order served January 12, 1960, and dated January 6, 1960, the Commission, by Division 3, entered an order requiring the cancellation of the proposed tariff and discontinuing the proceeding for the reason that the proposed commodity and mileage rates on petroleum and petroleum products were unlawful because the transportation thereof would exceed appellant's operating authority.

On February 11, 1960, Union Cartage Company filed a petition for reconsideration assigning six specific errors to the report and order of the Division dated January 6, 1960.

By date of May 13, 1960, the Interstate Commerce Commission issued an order denying the petition for reconsideration, stating as follows:

> It Is Ordered, That the said petition be, and it is, hereby denied, for the reasons that the matters submitted in support thereof do not constitute substantial material grounds to warrant reopening this proceeding for reconsideration.

Appellant brought this action in the United States District Court for the District of Massachusetts under Title 28, United States Code, Sections 1336 and 2325 to review the ruling of the Commission. The Court held that a motor carrier's operating authority to carry contractor's machinery and equipment, heavy machinery, and commodities requiring the use of spe-

cial equipment did not authorize it to carry petroleum products in tank trucks. The Court found that the Interstate Commerce Commission must be allowed broad scope and be permitted to exercise its special competence in interpreting its own language and words of art.

Pursuant to Rule 10 of the Revised Rules of the Supreme Court of the United States, notice of appeal to this Court was filed in the United States District Court for the District of Massachusetts on June 5, 1961. Pursuant to Rule 13 of the Revised Rules of the Supreme Court of the United States, and upon appropriate motion granted by the Court below, the time for filing this Jurisdictional Statement was extended to September 27, 1961.

THE QUESTIONS ARE SUBSTANTIAL

Initially, it is pointed out that appellant does not question the Interstate Commerce Commission's power generally to interpret certificates of public convenience and necessity issued by it.

Appellant does question the apparent boundlessness of this power. Where, as is the case here, the Commission interprets one of its certificates in a manner contrary to its interpretation at the time the certificate was issued, and even contrary to the informal opinion by one of its authorized employees, all of which appellant has relied upon in a business transaction, then the Commission strains and exceeds its statutory bounds of discretion. Appellant will demonstrate to the Court that the Commission has, by interpretation arbitrarily deleting a portion of appellant's authority, deprived appellant of its property, in a manner at odds with substantive due process. This is not merely

a question of agency discretion in the abstract, nor one which can be dismissed on a general allegation of discretion of an administrative agency.

Appellant first submits that the phrase "commodities requiring the use of special equipment" must necessarily be considered in and of itself. It is noted that the phase does not read "and *other* commodities . . ."; rather, it is separate and apart from the antecedent words. Therefore, it must be conceded that the particular words contained in the phrase in question have a definite meaning, *i.e.*, the words authorize the transportation of particular commodities.

Thus, it is a reasonable contention that the words in question mean, as far as the Interstate Commerce Commission is concerned, exactly the same as they have been defined by the Commission in the past. However, were appellee's argument to be accepted, the words would be rendered meaningless, as we shall hereafter demonstrate.

The Court below relies on the principle of *ejusdem generis,* and concludes that since the initial words "contractor's machinery and equipment, heavy machinery . . ." refer specifically to heavy haulers, then the more general words, *i.e.*, "commodities requiring the use of special equipment" must refer back to, and take color from, these specific words.

When properly applied, the rule of *ejusdem generis* is a useful canon of construction. However, it cannot be employed to render general words meaningless.[1] Furthermore, where the particular words used exhaust the class, full and general import should be accorded

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[1] *Mason* v. *United States,* 260 U.S. 545 (1923); *United States* v. *Alpers,* 338 U.S. 680 (1950).

the general expression.[2] It is difficult, if not impossible, to conceive of anything similar to contractor's machinery and equipment and heavy machinery which is not comprehended within the generally accepted definitions of those words. In this posture, "commodities requiring the use of special equipment" must be given full meaning. To do otherwise would cause the phrase in question to be superfluous.

The broader doctrine of *noscitur a sociis* is also cited by the Court below, meaning general and specific words which are capable of an analogous meaning, being associated together, or take color from each other, so that the general words are restricted to a sense analogous to the less general. Employing this doctrine, thus considering the certificate as a whole, which indeed the Commission requires,[3] it will be seen that three other commodity descriptions included within the certificate in question, *viz.*, sand, gravel, and fertilizer, include transportation of those commodities in bulk, because there is no restriction precluding such character of transportation. Therefore, because a part of the certificate in question definitely authorizes the transportation of commodities in bulk, it is not unreasonable to conclude that the phrase under consideration likewise includes such transportation.

Appellant purchased the instant certificate in reliance upon attorneys' opinions, and an informal opinion of the Interstate Commerce Commission, which, in turn, were based upon interpretations of the Commission dealing with "commodities requiring the use of special equipment." The Commission's interpre-

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[2] *United States* v. *Mescall*, 215 U.S. 26 (1909).

[3] *A.C.E. Transportation Co., Inc.—Interpretation of Certificate*, 51 M.C.C. 155 (1949).

tation prior to the issuance of the instant certificate clearly indicates that the phrase "commodities requiring the use of special equipment" included commodities in bulk, in tank vehicles. Commission interpretations subsequent to this grant have been generally consistent.

First, the word "commodities" is given the broadest possible definition. "General commodities" includes *all* commodities.[4] Secondly, the term "special equipment" is held to include tank trucks.[5] It is significant to note that the *Clarence Meddock* case cited below was decided by the Interstate Commerce Commission in August of 1941. That decision was prior to the issuance of the certificate now under consideration, originally issued in 1942, and clearly suggests that the Commission in its expertise utilized the phrase in question in reliance upon its own decisions. Thirdly, where the Interstate Commerce Commission has had an opportunity to consider "commodities requiring the use of special equipment" as a whole, the Commission has held that a carrier may not lawfully transport commodities in bulk, in tank vehicles, where its authority specifically excludes the transportation of "commodities requiring the use of special equipment."[6] The fact that the phrase in question appeared in a restrictive sense rather than in the affirmative granting c[illegible]e is immaterial by Commission standards.[7]

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[4] *Coastal Tank Lines, Inc.* v. *Charlton Brothers Transportation Company, Inc.*, 48 M.C.C. 289 (1948).

[5] *Clarence Meddock, Extension of Operations—Refrigerator Service*, 30 M.C.C. 301 (1941).

[6] *Transport Motor Express, Inc., Extension—Lacquers and Paints*, 53 M.C.C. 267 (1951).

[7] *E. Brooke Matlack, Inc.—Control—Reader Brothers, Inc.*, 80 M.C.C. 349 (1959).

The Commission has not overruled the above hol
ings, nor does it specifically do so here. The Distri
Court accepts the inconsistency on the principle that t
Commission must be allowed "broad scope to regulate
Appellant, on the other hand, submits that this "broa
scope to regulate" is not without bounds. It mu
necessarily have limits. What was done here seem
clearly without such bounds. Those subject to Co
mission regulation, who reasonably rely in their bus
ness transactions upon its prior policy to their detr
ment, cannot be convinced that this inconsistency
desirable regulation. The public has a right to re
upon representations of the Commission in connecti
with business transactions, and in fact, must do so
the conduct of regulated business.

A question of real importance is the propriety of t
District Court's conclusion that the Commission's co
struction of the certificate in question should not
disturbed for the reason that administrative interpret
tions by the agency charged with the enforcement of
statute are entitled to great weight. This, as a val
principle, appellant has already conceded. Howeve
this principle does not abate judicial review. Here t
Commission's action is irreconcilable with its own lon
standing interpretations, and the Court is not bound
accept such an inconsistent interpretation.[8]

The Court is here called upon to decide more than t
great discretion of an administrative agency. Notwit
standing this almost boundless discretion as is co
tended for, most administrative matters cannot valid
be withdrawn from judicial cognizance. In the wor
of Mr. Justice Sutherland,

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[8] *Interstate Commerce Commission* v. *Railway Labor Executiv
Association*, 315 U.S. 373 (1942).

> "And if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of supreme autocracy, become submerged by a multitude of minor invasions of personal rights less destructive but no less violative of constitutional guaranties."[9]

It appears that appellant had, at one time, certain property which was valuable to him. In a short time, through administrative proceedings culminated by an order from the administrative agency consisting of one sentence, appellant no longer is able to claim that property. In this regard, appellant does not contend that the Commission's action was merely erroneous, but that it lost what it was led to believe was its property through action at odds with fundamental principles. Therefore, the instant question is of importance to this Court.

The cease and desist order of the Interstate Commerce Commission is specific and final. It leaves no alternate course for appellant.[10] The Commission has stated that the phrase "commodities requiring the use of special equipment" does not include the transportation of commodities in bulk, in tank vehicles. What then does the phrase in question authorize? Can it be contended that this portion of the certificate

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[9] *Jones* v. *Securities and Exchange Commission*, 298 U.S. 1 (1956).

[10] See *Salvino* v. *United States*, 119 F. Supp. 277 (1954).

purchased by appellant is simply superfluous? If such be the case, then the administrative agency has acted unreasonably and has abused its discretion. As was stated in *Morgan* v. *United States*,[11]

> "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi judicial function is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purpose for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

It is then appellant's contention that the Interstate Commerce Commission has rendered the phrase in question meaningless. The Commission has thus taken away appellant's property, without due process, and has therefore acted in contravention of the Fifth Amendment.

Further, through its inconsistency, the Commission has acted in contravention of 49 U.S.C. §312(a) by effecting a retroactive revocation of appellant's operating authority. This Court has condemned such action in the past,[12] and it should be so condemned here. Section 212(a) of the Interstate Commerce Act, 49 Stat. 555, 49 U.S.C. Section 312(a), prescribes the proper procedure for revocation of operating authority. That procedure was not followed here, indicating that ap-

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[11] 304 U.S. 1 (1938).

[12] *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1957).

pellant has been deprived of its property without procedural due process.

It is therefore respectfully submitted that the questions raised in this statement are of substantial importance. The motor carrier industry requires the guidance which a disposition of the instant case will afford.

Respectfully submitted,

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APPENDIX A

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MASSACHUSETTS

Civil Action No. 60-540-F

UNION CARTAGE COMPANY

v.

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

Before Aldrich, Circuit Judge, and Ford and Day
District Judges

Opinion

April 26, 1961

ALDRICH, Circuit Judge. This complaint to a three-judge district court to review and set aside an order of the Interstate Commerce Commission interpreting a motor carrier's operating authority raises a single question. The mooted portion, describing what petitioner may carry, reads as follows:

> "Contractor's machinery and equipment, heavy machinery, and *commodities requiring the use of special equipment.*"[1] (ital. suppl.)

The Commission ruled that the italicized phrase does not permit the carriage of petroleum products in tank trucks. *Petroleum—Union Cartage Co.*, 1960, 309 I.C.C. 333. This action resulted.

It is true that in certain circumstances the phrase "commodities requiring the use of special equipment" may

[1] Subsequent, separate, paragraphs provide for the transportation of agricultural machinery, sand and gravel, and fertilizer, within much more limited geographical areas. Both sides seek to draw comfort from this. If it helps anyone, we think it is the Commission.

refer, inter alia, to petroleum products in tank trucks. For example, where a carrier has a general commodities license but "commodities requiring the use of special equipment" are excluded, this exclusion is held to encompass tank-carried products. *Transport Motor Express, Inc., Extension—Lacquers and Paints,* 1951, 53 M.C.C. 267. Petitioner claims that if a clause embraces a certain matter when used in one connection, it must in another. This simply is not so. The meaning of a phrase, like a word, is shaded and colored by its surroundings. Familiar principles of *ejusdem generis, in pari materia,* or *noscitur a sociis,* are all ways of saying that the whole must be looked at, and not a single part separately.

The Commission points out (and petitioner concedes) that the initial words "Contractor's machinery and equipment, heavy machinery . . ." refer specifically to heavy haulers. It then says that the additional phrase "commodities requiring the use of special equipment" in this association reads naturally on matter closely related,[2] and holds that interpreting the clause more broadly is to be avoided as introducing a new and totally unrelated activity. Correspondingly, with respect to petitioner's contention as to general commodity carriers, the Commission again points out that the carriage of bulk products in tank trucks is a separate, specialized field. Therefore, it says, in the one case the phrase "commodities requiring the use of special equipment" is to be read narrowly, in order *not to introduce* a dissimilar activity, and in the other case broadly, in order *to exclude* a dissimilar activity. *Compare Petroleum Carrier Corp.* v. *Black,* 1950, 51 M.C.C. 717, *with The Western Express Co.—Sealdtanks,* March 22, 1961, No. MC-8902.

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[2] "The words 'special equipment' in a number of motor-carrier certificates mean the use of such special equipment as may be necessary for the loading and unloading of the vehicles of the heavy haulers, and are used as a means of identifying the commodities which the heavy haulers may transport." 309 I.C.C. at 335.

The Commission must be allowed broad scope to regulate, which is its designed function, see *A. B. & C. Motor Transportation Co.* v. *United States*, D.C.D. Mass., 1955, 130 F. Supp. 87, and, within reason, it must be permitted to exercise its special competence by interpreting its own language and words of art. We see nothing arbitrary or capricious in the principle adopted, and, in the application of this principle, we see nothing incongruous in the construction given the particular language of petitioner's operating authority. There is certainly no novelty in classifying motor carriers on the basis of commodities transported. *Classification of Motor Carriers of Property*, 1937, 2 M.C.C. 703; *St. Johnsbury Trucking Co., Inc. Extension—Heavy Hauling*, 1951, 53 M.C.C. 277.

An order will be entered denying the relief sought by the plaintiff and dismissing its complaint.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. M-11779
Petroleum-Union Cartage Company

Decided January 6, 1960

Proposed commodity and specific mileage rates on petroleum and petroleum products, in bulk in tank trucks, between specified points in Massachusetts, New Hampshire, and Vermont, found unlawful because beyond the scope of respondent's operating authority. Schedules ordered canceled, and proceeding discontinued.

Leonard A. Jaskiewicz and *Arthur A. Wentzell* for respondent.

Wilmer A. Hill for protestant.

Report of the Commission

Division 3, Commissioners Freas, Walrath, and McPherson.

By Division 3:

Due and timely execution of our functions under section 216(g) of the Interstate Commerce Act imperatively requires the omission of a recommended report and order in this proceeding. Requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By schedules filed to become effective on September 19, 1958, the respondent, Union Cartage Company, a motor common carrier, proposed to establish commodity and spe-

cific mileage rates on petroleum and petroleum products, in bulk, in tank trucks, subject to various minimum weights, between specified points in Masachusetts, New Hampshire, and Vermont. Upon protest of P. B. Mutrie Motor Transportation, Inc., the operation of the proposed schedules was suspended until April 19, 1959, when they became effective. For convenience, these schedules will be referred to as the proposed rates or schedules.

The proposed rates are on the same level as those published by the protestant and the New England Motor Rate Bureau for tank-truck operators in the New England area. The principal issue requiring our consideration is whether the respondent's operating authority permits the transportation of petroleum and petroleum products between the specified points. The disputed portion of the certificate reads: "Contractor's machinery and equipment, heavy machinery, and commodities requiring the use of special equipment."

On brief, the respondent renews its objection made at the hearing to the receipt in evidence of any material referred to in the "grandfather" application of its predecessor, on the ground that such evidence is improper and inadmissible. While no reliance is placed by us on this admitted material, we regard the objection as without substance, and it is overruled.

The authority which the respondent holds from this Commission to perform transportation service in interstate or foreign commerce, so far as here pertinent, is that designated in its certificate of public convenience and necessity No. MC-95490 (Sub-No. 12), dated May 8, 1958. That certificate embraces authority granted under the "grandfather" clause in section 206(a) of the act and embodied in certificate No. MC-30222, issued March 28, 1951, to Sherman Brown Manning, doing business as S. B. Manning, the rights in which were transferred to the respondent pursuant to an order of this Commission dated January 31,

1958. The specific operating rights granted the respondent under that certificate, and with which we are here concerned, authorizes transportation over irregular routes of:

> Contractors' machinery and equipment, heavy machinery, and commodities requiring the use of special equipment;
>
> Between points in Essex, Caledonia, Orange, Windsor, and Windham Counties, Vt., those in New Hampshire, and that part of Massachusetts east of Massachusetts Highway 12 and north of Massachusetts Highway 44, including points on the indicated portions of the highway specified.

Pursuant to this authority, the respondent filed the proposed schedules setting forth commodity and mileage rates on petroleum and petroleum products, in bulk in tank trucks, between the points as above stated. It contends that authority to perform this service is included in that portion of the commodity description in this certificate authorizing the transportation of "commodities requiring the use of special equipment."

The protestant, who has been transporting the subject commodities for many years in the area here concerned under certificated authority, insists that the above-quoted phrase is ambiguous, and that its true meaning and intent can be determined only by reviewing the underlying data filed with the "grandfather" application of the respondent's predecessor. Additionally, the protestant claims that this phrase must be construed as applying to commodities of the type and character of those which precede it in the certificate. Based on this contention, it urges that the doctrine of *ejusdem generis* must be applied, and that thus the phrase may not be interpreted as contemplating the transportation of petroleum and petroleum products.

In *Classification of Motor Carriers of Property*, 2 M.C.C. 703, division 5 established a number of classifications and groupings of motor carriers based on the types of commodities transported. Carriers of heavy machinery, group

(3) under this classification, include common and contract carriers engaged in the hauling of heavy machinery and equipment, including road machinery, structural steel, oilfield rigs, and oilfield equipment. An explanatory note below group (3) reads:

> These commodities are grouped together because of the equipment required and the nature of the service performed. The territorial scope of the service is usually similar to that of the household-goods carriers * * *. Certain auxiliary or accessorial services are also performed in the transportation of these commodities, such as the dismantling and resetting of machinery, often requiring the use of rigging, skidding, and similar devices. A carrier of this class may find that all of his facilities are employed for a considerable period of time in a locality which is only part of the territory in which he is authorized to serve. This type of carrier is usually a class D-3 operator. The movement involves and embraces the transportation of heavy machinery and similar equipment to, from, and between unlimited points of origin and unlimited points of destination within the territory served by such carrier, over irregular routes, in either direction, outbound, or back haul, or in cross movements.

It seems to us clear that the phrase "commodities requiring the use of special equipment" following the description "Contractor's machinery and equipment, heavy machinery," defines the nature of the transportation service performed as one within the scope of a heavy hauler as described in group (3) of the above-mentioned classification. The words "special equipment" in a number of motor-carrier certificates mean the use of such special equipment as may be necessary for the loading and unloading of the vehicles of the heavy haulers, and are used as a means of identifying the commodities which the heavy haulers may transport. Most of the certificates issued to general-commodity carriers, for example, contain a restriction against the use of special equipment, leaving no doubt that the restriction means exactly as it reads. *St. Johns-*

bury Trucking Co., Inc., Extension—Heavy Hauling, 53 M.C.C. 277, 285, 297.

An issue similar to the one here was raised in *Petroleum Carrier Corp.* v. *Black*, 51 M.C.C. 717. The portion of the certificate there concerned read: "Machinery and machinery parts, road construction machinery, contractors' equipment, structural and reinforcing steel, and commodities requiring special equipment, * * *." After pointing out that the commodities other than articles "requiring special equipment" named in the certificate were closely related and established the predecessor carrier's type of service as that of a heavy-machinery hauler, division 5 concluded that the defendant's certificate did not authorize the transportation of petroleum products, in bulk in tank vehicles.

The respondent urges that the phrase "commodities requiring the use of special equipment" permits it to transport, not only petroleum and petroleum products in bulk in tank vehicles, but any commodities, including chemicals or oils. Such a construction would unduly broaden the authority contained in the respondent's certificate and in other certificates of like import. We think the rule of *ejusdem generis*[1] lends support to the conclusion that this phrase in the respondent's certificate was intended to refer to and does encompass commodities of the type and character of those which precede it, and contemplates the transportation of such articles which are or may be considered in the trade as having some relation to "contractor's machinery and equipment, heavy machinery."

We find that the proposed commodity and specific mileage rates on petroleum and petroleum products are unlawful in that transportation thereunder would exceed the respondent's operating authority. An order will be entered requiring the cancellation of the proposed schedules, and discontinuing the proceeding.

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[1] Explained in *Petroleum Carrier Corp.* v. *Black*, *supra*, at page 722.

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No. 448

In the Supreme Court of the United States

OCTOBER TERM, 1961

UNION CARTAGE COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment, entered on April 26, 1961, by a three-judge district court, convened pursuant to 28 U.S.C. 2284 and 2325, dismissing an action brought to set aside an order of the Interstate Commerce Commission. Appellant is a common carrier by motor vehicle authorized to transport "[c]ontractor's machinery and equipment,

heavy machinery, and commodities requiring the use of special equipment" (J.S. 1a). In a proceeding to determine the validity of rates proposed by appellant for the carriage of petroleum and petroleum products, the Commission held that the rates were "unlawful in that transportation thereunder would exceed [appellant's] operating authority" (J.S. 8a).

The Commission noted, and appellant concedes (J.S. 2a), that the language, "[c]ontractor's machinery and equipment, heavy machinery," in appellant's certificate of public convenience and necessity refers to the operation of a heavy hauler. The Commission further observed that carriers engaged in the hauling of heavy machinery must perform related services which often require the use of special equipment. It therefore held that the designation "commodities requiring the use of special equipment" does not confer additional transportation authority upon the appellant, but merely "defines the nature of the transportation service * * * of a heavy hauler" (J.S. 7a).

Applications for reconsideration were denied by the full Commission (J.S. 6), and the district court unanimously sustained the order (J.S. 1a–3a).

ARGUMENT

This appeal presents no substantial question requiring further review by this Court.

The sole question in this case involves interpretation of the language in a motor carrier certificate of public convenience and necessity. After full administrative proceedings, the Commission concluded that the phrase "commodities requiring the use of special

equipment" merely clarified the designation of a heavy hauler to which it was appended and did not grant any essentially different authority.

The interpretation of a certificate issued by the Commission is primarily a question for that agency (see *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171), and is "simply a definitive declaration of what rights existed from the very beginning under the permit" (*Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554, 558–559, n.4). The Commission's interpretation is therefore usually sustained "unless found to be clearly erroneous" (*ibid.*). In the present case, the district court correctly held that the challenged order was neither "arbitrary" nor "capricious", and was well within the Commission's interpretative authority (J.S. 3a).

The Commission's interpretation of the authority granted by the certificate in the present case follows closely its earlier decision in *Petroleum Carrier Corp.* v. *Black*, 51 M.C.C. 717, in which the term "and commodities requiring special equipment" appended to language similarly defining a heavy hauler operation was held not to authorize the transportation of petroleum products in bulk in tank vehicles. Petitioner cites no case in which the phrase at issue, as used here, has been interpreted to authorize transportation of any goods not directly related to such normal heavy haulage services.[1]

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[1] Heavy haulers have often been referred to as carriers of "commodities requiring special equipment." See, *e.g.*, *Dallas & Mavis Forwarding Co., Extension—Galion, Ohio*, 72 M.C.C. 653, 656; *Hove Truck Line* v. *Eldon Miller, Inc.*, 63 M.C.C. 753, 756.

In a number of cases, the Commission has used the phrase "commodities requiring the use of special equipment," or its equivalent, to characterize the commodities specifically excluded from a certificate authorizing a carrier to engage in the transportation of general commodities. As so used, the term has been broadly interpreted to exclude carriage of such bulk commodities as petroleum or chemicals, which require special tank cars, as well as to exclude the types of goods carried by heavy haulers. But, as the court below pointed out (J.S. 2a), a given phrase often means one thing in an exclusionary context and quite another when used, as here, as a supplement to words defining a well recognized type of haulage to which the phrase can be related. Certainly there is nothing "clearly erroneous" in the Commission's view that the inclusion of the phrase in the certificate was not intended to give heavy haulers authority to transport an entirely different type of commodity utilizing a different type of equipment, which the Commission normally authorizes by language expressly referring to the use of tank cars for the transportation in bulk of petroleum or petroleum products. See, *e.g., Cantlay & Tanzola, Inc., Common Carrier Application,* 10 M.C.C. 743, 754; *Dugan Extension of Operations—Nebraska Points,* 26 M.C.C. 233; *Leaman Transportation Co., Contract Carrier Application,* 34 M.C.C. 73, 82.[2]

[2] Appellant also alleges that "[it] purchased the instant certificate in reliance upon * * * an informal opinion of the Interstate Commerce Commission" (J.S. 9) and implies that the Commission is bound thereby (J.S. 11). But this Court has long held that the Commission is not bound by the informal

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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OCTOBER 1961.

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opinions of its employees. *Minneapolis R.R.* v. *Peoria Ry.*, 270 U.S. 580, 585. In any event, this issue has been waived because it was not presented to the Commission in the petition for reconsideration. *United States* v. *L. A. Tucker Truck Lines*, 344 U.S. 33, 36–38.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 118

UNION CARTAGE COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal from the United States District Court for the District of Massachusetts

BRIEF IN REPLY TO MOTION TO AFFIRM

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November 15, 1961

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 448

UNION CARTAGE COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal from the United States District Court for the District of Massachusetts

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BRIEF IN REPLY TO MOTION TO AFFIRM

Pursuant to Rule 16(3) of the Revised Rules of the Supreme Court of the United States, appellant files its brief opposing the motion to affirm.

REPLY

Appellant is, of course, as appellee points out, aware of the amount of agency discretion, particularly in the interpretation of its own certificates.[1] However,

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[1] *Malone Freight Lines, Inc.* v. *United States*, 107 F. Supp. 946, affirmed 344 U.S. 925 (1953).

we urge the court to scrutinize this particular case, rather than summarily dismiss it on the ground of agency discretion *per se*.

The notable reason that this proceeding should not be so dismissed is apparent from appellee's motion to affirm. Appellee states that:

> It [the lower court] therefore held that the designation 'commodities requiring the use of special equipment' does not confer additional transportation authority upon the appellant, but merely defines the nature of the transportation service, . . . of a heavy hauler . . . the phrase 'commodities requiring the use of special equipment' merely clarified the designation of a heavy hauler . . .

The above argument leads to no other logical conclusion than the phrase in controversy merely defines and clarifies, yet in reality means nothing, *i.e.*, it authorizes the transportation of no particular commodity. Certainly the discretion to interpret one of its own certificates belongs primarily to the Commission. However, destruction by interpretation is another matter. As alleged in the Jurisdictional Statement, the phrase, by construction, has been rendered meaningless as a substantive matter. In so doing, a basic principle, set forth by this court, has been violated.[2]

Subsequent to its argument that the phrase in question merely "clarifies," appellee proceeds to argue that the phrase "means" one thing in an exclusionary context and another when used affirmatively. Again, appellant must point out that the Commission itself in its discretion has held that a commodity description cannot logically mean one thing when used in granting

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[2] *United States* v. *Alpers*, 338 U.S. 680 (1950).

authority, and another when used as an exception to a grant.[3] Once more, the Commission is inconsistent to the detriment of appellant.

Combining appellee's several arguments, we find that the Commission allegedly has, by inclusion of the phrase in question, merely characterized the type of transportation to be performed by virtue of Certificate No. MC-95490. Therefore, we must necessarily conclude that the transportation of fertilizer, which is included within the instant certificate, is typical of heavy haulage. Such is not the case. The point is, that the inclusion of heterogenous commodities within a single certificate is not unusual. We refer, for example, to Certificate No. MC-101960, issued by the Interstate Commerce Commission authorizing the transportation of: *coal, livestock, lumber, agricultural commodities, farm implements, automobile accessories, feed,* and *groceries.*

A word must be said relative to appellee's reliance on *Petroleum Carrier Corp.* v. *Black.*[4] The majority of Division 5 in its discussion in the *Petroleum Carrier* case places significant reliance upon the word "articles." When the complaint was originally filed in the *Petroleum Carrier* case, the certificate involved included the phrase "commodities requiring the use of special equipment." The majority of Division 5, however, for reasons set forth in the report, revoked the certificate authorizing "commodities requiring special equipment" and issued a certificate reading "articles requiring special equipment." The entire discussion of the majority of Division 5 pertains to the

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[3] *E. Brooke Matlack, Inc.—Control—Reader Brothers, Inc.*, 80 M.C.C. 349 (1959).

[4] 51 M.C.C. 717 (1950).

description of "articles requiring special equipment." This is clear from the language at pages 720-21 of the *Petroleum Carrier* case as follows:

> We, therefore, concurrently with our action in this proceeding do hereby revoke certificate No. MC-106644 insofar as it authorizes the transportation of commodities requiring special equipment. A certificate authorizing transportation of articles requiring special equipment will be issued. *Our discussion hereafter will pertain to the latter commodity description.* [Emphasis added]

Appellant is simply asking the court to require the Commission to give effect to a particular commodity description which the Commission has included within one of its certificates of public convenience and necessity. It is difficult to understand why the phrase "contractor's machinery and equipment, heavy machinery," requires clarification. It is similarly difficult, if not impossible, to conceive of anything similar to contractor's machinery and equipment and heavy machinery which is not comprehended within the generally accepted definition of those words. In this posture, "commodities requiring the use of special equipment" must be given full meaning. In *Black* v. *Interstate Commerce Commission*,[5] the Circuit Court of Appeals for the Fifth Circuit in construing a similar certificate said:

> It becomes patent from an examination of the certificate in question that it was not intended to include within its scope the transportation of automobile parts. Specifically, *the certificate authorizes the transportation of five different classes or types of property*: (1) machinery and machinery parts; (2) road construction machinery; (3) contractor's equipment; (4) structural and reinforce-

[5] 167 F. 2d 825 (1948).

ing steel; and (5) commodities requiring the use of special equipment. [Emphasis added]

Therefore, it is appellant's contention that the phrase "commodities requiring the use of special equipment" has a definite meaning within itself, and since appellee admits in its motion to affirm that the phrase has no such meaning, rather it merely defines and clarifies the foregoing words, that the Commission has abused its discretion to the detriment of appellant. Judicial review is not abated by such agency discretion. We now respectfully request that the court make a more definitive statement, rather than add to the gigantic list of cases dismissing such suits on the sweeping ground of "agency discretion."

Respectfully submitted,

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